CARMEN POWELL, IN PRO PER
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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY YNH DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Carmen Powell, Plaintiff/Petitioner/Movant vs Defendants/Respondent/s City of Chula Vista; Chula Vista Police Dept, Det Ruth Hinzman; Agt Anderson; Agt Oyos, Sgt Cervantes; and person and entities unknown, City of San Diego and San Diego County Protective Services Workers, Julie Smith, Nadia Najors, Megan Petfinger, Sophia Sanchez, Lisa Garcia and Deborah Davies, LCSW and entities and persons unknown Does 1 to 100	Case No. '07 CV 1836 JAH MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT **AUGUST 18, 2008** **TIME: 2:30P.M.** **HONORABLE JOHN A. HOUSTON** DEPT: 11

County council, clearly misrepresents the relief sought by Plaintiff in this court, and I wish to make it clear that I am not seeking to upset, or ask this court to review or relitigate the state court decision on the (342 Petition), the proper venue is being sought on appeal. So I will begin by answering the following as laid out by county council in exhibit I. of their motion to dismiss.

I.

Stating that my complaint should be dismissed because under the Rooker-Feldman Doctrine, this court lacks jurisdiction to review state court orders and judgments concerning juvenile dependency and custody matter. This is true, however this Plaintiff is not asking this court to review the state order and or judgment as this court knows that Plaintiff filed this suit long before there was a judgment in state court on the 342 Petition which is before the court. I reference, Supreme Court Exxon Mobil Corp. v

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Saudi Basic Industries Corp. (d) The Rooker-Feldman doctrine does not preclude the federal court from proceeding in this case. Exxon Mobil has not repaired to federal court to undo the Delaware judgment in its favor, but appears to have filed its federal-court suit (only two weeks after SABIC filed in Delaware and well before any judgment in state court) to protect itself in the event it lost in state court on grounds (such as the state statue of limitations) that might not preclude relief in the federal venue. Rooker-Feldman did not prevent the District Court from exercising jurisdiction when Exxon Mobile filed the federal action, and it did not emerge to vanquish jurisdiction after Exxon Mobile prevailed in the Delaware courts.

This Plaintiff filed her suit long before there was a judgment in state court to preserve her action by state statute of limitations and therefore Rooker-Feldman does not apply for two reasons, the complaint was filed before the state judgment and the complaint is regarding the defendants actions against the plaintiff, not the states judgment. Plaintiff is representing and independent claim rather than a claim premised on an injury caused by the state court's judgment which had not taken place at the time Plaintiff had filed this action, the Plaintiff is not seeking to set aside a state court judgment in which this claim is independent. "Edwards v. Illinois Bd. Of Adm. To the Bar, 261 F. 3d 723, 726-29 (7th Cir. 2001) (quoting Long, 182 F. 3d at 555),

Plaintiff contends that the defendants conspired – prior to any judicial involvement – to cause false child neglect proceedings to be filed, resulting in the removal of her children, from her home in violation of her Fourth Amendment and Fourteenth Amendment substantive and procedural due process rights. Plaintiff clarifies that she is seeking damages for the conspiracy and the actions of the defendants, not for the state court's decision in the 342 proceedings. Plaintiff maintains that she has an independent claim which is not barred by Rooker-Feldman, see Jensen v. Foley, 295 F. 3d 745 (7th Cir. 2002), in Jensen the parents sued the Illi9nois Dept. of Children and Family Services, along with local law enforcements officers, after defendants removed the child from her parents custody without a pre-deprivation hearing. Brokaw v Weaver, Mercer County, (7th Cir. Sept, 2002), 235 F. 3d 1000 (7th Cir. 2000), the Jensens argued that the removal was unconstitutional because the defendants lacked probable cause or exigent circumstances, “the injury that the plaintiffs here complain of was caused not by the state court’s judgment, but by the underlying taking of plaintiffs child by the DCFS agents and local officers. Plaintiff in this case if not stating that the injury was caused by the state court, but by the defendants alleged unconstitutional conduct.

In support of Plaintiff position she cites Nesses, 68 F. 3d 1003, the District court dismissed Nesses’ suit for lack of jurisdiction based on the Rooker-Feldman doctrine, the United State Court of Appeals Seventh Circuit rejected that conclusion, reasoning that the Rooker-Feldman doctrine did not bar Nesse; claim because his suit was not premised on a claim that the state court judgment denied him some constitutional right; rather, his federal claim was based on a right independent of the state court proceeding, the court goes on to further to explain in Nesses, any other conclusion would mean that “there would be no federal remedy for a violation of federal rights whenever the violator so far succeeded in corrupting the state judicial as to obtain a favorable judgment,…”id. At 1005 Moreover, we reasoned that such a “result would be inconsistent with cases in which, for example, police officers are sued under 42 U.S.C. s 1983 for having fabricated evidence that resulted in the plaintiff’s being convicted in a state court.”Id. Plaintiff alleges that she was barred from having a reasonable opportunity from raising her due process claims before the state court based on her waiver of rights form signed on February 1, 2007 where she will show that the waiver was given without full knowledge and fraud, withholding of information to give Plaintiff an unfair advantage in state court, Plaintiff sights Long, 182 F. 3d at 558 (quoting Wood v. Orange County, 715 F. 2d 1543, 1547 (11th Cir. 1983) Long concluded that because the plaintiff could not have presented her due process claims before the state court during the forcible entry and detained proceedings, Long did not have a reasonable opportunity to raise her claims in state court. Id. At 558-59. Accordingly, Long held that the Rooker-Feldman doctrine did not apply to bar the plaintiffs due process claims. Id. At 561.

This exception to the Rooker-Feldman doctrines is significant, and therefore we reiterate: While the Rooker-Feldman doctrine bars federal subject matter jurisdiction over issues raised in state court, and those inextricable intertwined with such issues, "an issue cannot be inextricable intertwined with a state court judgment if the plaintiff did not have a reasonable opportunity to raise the issue in state court proceedings."Id. at 558.

In this case Brokaw v Weaver, Mercer County (7th Cir. 2002), the Rooker-Feldman doctrine does not bar A.D's claims because she did not have a reasonable opportunity to raise her constitutional claims in the state court child neglect proceedings. That proceeding was brought under the Juvenile Court Act, which at the hearing stage, allowed the court to "consider only the question whether the minor is abused, neglected, delinquent, in need of supervision, or dependent."

Plaintiff cites Nesses, 68 F. 3d 1003 and states that reasoning applies here for this reason, Plaintiff is not merely claiming that the decision of the state court was incorrect or that the decision violated her constitutional rights; rather, she is alleging that the defendants decision to forcibly remove her from her home and to seize her children without a warrant or court order and subject her to fight false allegations brought against her violated her constitutional rights, independently of the state court decision, which at the time of filing had dismissed the charges against her on February 1, 2007 and considered the reports dated 8/22/06, 9/12/06,10/12,06 and 02/01/07, (see minute order February 1, 2007), and 02/01/06 that was also filed.

County council goes on to state Heck v. Humphrey, teaches that the plaintiff cannot proceed with her lawsuit in this court because she cannot satisfy a fundamental prerequisite element of her claim-that is that the Superior Court juvenile dependency proceedings terminated in her favor, however Plaintiff is not bringing this claim on the state courts judgments, this claim is brought against defendants in this matter. On February 1, 2007 the juvenile proceedings did conclude in my favor (or so I was lead to believe), these charges were dismissed against me and a new petition was filed under 342, and the 342 is not the subject matter for Plaintiff, see STARKEY V. BOULDER COUNTY SOC. SERVS. 2006, D. Colo. November 21, 2006, see SHALLOW V. ROGERS 2006, 3RD Circuit October 27, 2006, and the Plaintiff states again that she is not seeking to over turn a state court decisions, Plaintiff this action to obtain damages for the constitutional violations she claim arouse during that action, that she was barred from raising in state court.

II.

County council goes on to state that my claim should be dismissed under Rule 12 (b)(6) because it is subject to claim preclusion defense, and they site Stewart v. United States Bancorp F. 3d 953 (9th Cir. 2002) (motion to dismiss based on res judicata granted). Plaintiff claim is not the subject matter of the 342 Petition before the state court. Plaintiff was barred from brings her claims forward based on the judgment on February 1, 2007 by the county and minors council stating "it's been adjudicated", therefore Plaintiff was barred from raising these claims before the state court nor has the actions in state court ruled on or decided regarding Plaintiff's due process claims against the defendants. Every time Plaintiff attempted to bring forth this information county council and minors council stated "342 where the court only considered the allegations in the 342 Petition and the prior petitions had been adjudicated" as stated in the minute order dated 02/01/07 the petitions that were dismissed against me on 02/01/07.

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Council states that I am precluded by the doctrine of collateral estoppels from revisiting issues addressed by the Superior Court, which council knows that I was barred from raising these issues in the 342 Petition, because the prior charges were dismissed against me on February 1, 2007. Council is confusing to me because the state court clearly denied me the right to not only raise these issues I was barred from calling certain witnesses because of the dismissal of the petitions on February 1, 2007, I further want to show not only was that dismissal based on fraud, that the Plaintiff's in state court had no intentions on living up to the agreement, the county's agreement was in (bad faith) the dismissal was meant to give me an unfair advantage in the state court, see e.g., Ernst, 108 F. 3d at 492 n. 4 (holding that grandmother's Section 1983 action against child welfare department was not barred by collateral estoppels because the state court merely determined the issue of "proper parental care or control," and did not address the grandmothers' constitutional claims premised on the welfare worker's alleged improper bias and motive).

On February 1, 2007 I went to what I believed was a settlement conference with my son, I was offered a settlement agreement that the charges would be dismissed against me, however I needed to stipulate to certain findings. Minor's council Rebecca Smith, she told me on behalf of the agency and that she had come up with this offer that would work for all involved presented me this offer. I clearly told her that I would not say that I had hit Larverne or that I abused my daughter Elizabeth, my attorney was also present. I was also given a report the day of the hearing dated 02/01/06 that was huge, as we consulted on the offer, which I was hesitant my attorney had me speak with the judge in chambers. I expressed my concerns regarding these lies in the reports, he stated something about losing my children was like a death sentence and that the standard of proof was very low by preponderance of the evidence, against my better judgment I stipulated and the charges were dismissed against me and I was required to sign a waiver of rights, giving up my rights to trial, my representing attorney told me that these charges could never be brought back against me and I believed that I would be seeing my special needs child that I had not seen since August 17, 2006. There is a whole vacant slate missing on this child's life, because she was not allowed to see her dependants siblings either, she was literally cut off from every one that she knew until January 10, 2007 is when she first saw her baby sister and baby brother.

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What I did not know is that Julie Smith and Rebecca Slade filed two reports that day on February 1, 2007, a **3 page reported dated February 1, 2007 and a 12 page report including discovery, UCSD medical records, body chart examination, case notes and medical records from Dr. Mirkarimi dated February 1, 2006.** I now know that the agency dismissed these charges against me in bad faith with no intentions of me ever reunifying, the dismissal was intended to do one things **to make sure that I could not raise these due process and constitutional issues in state court and to give me an unfair advantage.** The February 1, 2007 reports indicates that statements from **Shirley Pera, who county council refers to as Dr. Pera, however the State of California has issued her a license as a (marriage**

and family therapist) only. To further support my claim are the case notes or service logs statements that were provided on February 1, 2007 the last entry made is by **Julie Smith on January 30, 2007, however the logged on staff person Julie Smith ZA 1J is 01/31/07 with a time of 06:22PM page 59 of 59. I will now go to the discovery of the case notes or service logs that were provided by the agency during the trial as indicated by the date of February 11, 2008, please let me direct this court back to January 31, 2007 and the last entry was by Rebecca Slade,** now one might even say that Julie Smith had no knowledge of the comments posted by Rebecca Slade, however **Julie Smith and Rebecca Slade both signed the reports dated 02/01/06 and 02/01/07.** Plaintiff contends that she was never to know that this report of 02/01/07 existed, even if you go to the minute order and the court transcripts on that day, the judge does not even mention a report dated 02/01/06, **see page 2 of County councils 827 motion, which clearly indicate a report date 02/01/06 (no mention of a 02/01/07), perhaps an over sight.**

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Further support is on 08/22/06 this agency prepares a report full of fraud signed under penalty of perjury by Rebecca Slade and Megan Petsinger. When I first read the report and saw the photos submitted of my daughter I could not believe what I was reading nor seeing. I knew that my child had no injuries and I could not believe what Dr. Chase **(what the court was lead to believe)** had said, because it was not the history that I had given, and I certainly know my child's history. It is true that you are assigned an attorney, however not one of these attorney's tells you that you have a right to challenge the reports, that you are entitled to have these reports at least 5 days prior to the hearing, that the reports are to be read in court, these attorney's go into court with a blanket statement of "we waive the reading of the report", knowing how critical the information is and so on. So I did what most reasonable people would do and that is I filed my complaints with the director of the agency Jean Shepard, I filed with the Chula Vista Police Department and when I received the discovery regarding my daughter seizures I filed with the Medical Board of California in an attempt to get help for my children, however the attorney assigned to my children held the privilege and they had no interest then or now as to the treatment of my special needs daughter or any of my children as I continued to complain I was met with retaliation by this agency and others.

III

County council goes on to say that Julie Smith has absolute immunity for her role in providing evidence in court reports; it was Julie Smith who requested a four-week continuance to investigate further. The allegations particularly against Julie Smith, because we met in my home on January 30, 2007, she knew that I had a family table in my home, she knew that there were enough beds in my home, she saw the pictures on the wall, that the police did not photograph and the court denied me showing, and we **specifically talked about the video tape interview of my daughter by Deborah Davies.** I asked Julie Smith, why would she put in a report in October 12, 2006 that she watched to entire interview and my daughter quietly stated “something bad happened to her at her home but she did not want to talk about it. She said that if she talked about it her mother would be very mad at her”. **Julie Smith knows** **that my daughter never made this statement, nor did she whisper, she never says “she lies about it”, she clearly says “he lies about it, meaning Larverne”, to the contrary she talks about Larverne calling her a** liar, she goes on to say “why don’t you people listen to me, I’m happy and safe with my mommy. A*******, is crying she misses her mom, I miss my mom, my mommy is sad when we’re not there she misses her kids. Julie Smith knew that this child’s state of mind was not what this agency wanted to hear so she intentionally changed her words, she also knew that Deborah Davies never asked her about her feet, only her back she stated that she got hurt at school coming down the slide and went home and told her mom about her ouie. My daughter goes on to say that she talked to her attorney “and that she didn’t like what she said”, and that she was worried, she also has a bandage on her arm from an injury. Julie Smith also knew that I was put in the Child Abuse Index generated by Diana Chase on 08/15/06 regarding false information, although clearly indicating that there were no signs of physical abuse noted and she also knew that there was a more currant height and weight given to Nadia Najors, she withheld this information, which was exculpatory to me, she also had the body chart from 2001 showing the documented scars on my daughter at placement with me, she also withheld this exculpatory information until February 1, 2007. All of this information was withheld and dumped into this report dated 02/01/06 because they knew once they received my waiver that I would never be able to use this information, as they stated it was "adjudicated", it was to give me an unfair advantage and bar me from challenging these particular reports by this agency. Julie Smith also fails to follow the rules of the court as laid out in title five rules © Reports see attached, these rules are there for a reason, there is to be no reports by "ambush", these guidelines were set be the legislature to ensure uniformity and protections of all coming under the jurisdiction of dependency court. This type of fraud and withholding of information breeds this type of conduct, this agency has learned nothing from the **ALECIA WADE CASE,** my previous attorney indicated to me in very graphic details what this agency was doing to my daughter through isolation.

Julie Smith knew because she submitted this information in the 02/01/06 report that was given to me on February 1, 2007, that I did not put these old documented scars on my daughter, and I had given this information to (Dr. Chase), nurse Chase during the examination of my daughter, this agency needed injury and they used the old documented scars from 2001, Julie Smith knew that there was another height and weight given to Nadia Najors by my daughter's school nurse submitted in August, 2006, she withheld this information, she knew that L. Wilkerson had a long history of mental illness, she knew that my daughter had an active IEP which was due in October, 2006 and there was an IEP meeting in September, 2006 she provided me with no notification in September. Julie Smith and others knew that my daughter was emotionally fragile, they knew that she was on medication, they knew that she had a close bond with particularly me and her family and she intentionally lied in reports to hold on to the child and to keep her in isolation.

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Julie Smith, lied about what I said in my home, I have never told this women that I would bound the hands of my daughter, Julie Smith did not hear me yelling in the back ground during a call with Larverne Wilkerson, Julie Smith goes on to say that I have threatened or was rude to foster parents or their children and I can prove this is a total fabrication and she attributes these statements to others. As the social worker assigned she had all of this exculpatory information and did not bring it forward until almost six months later, Julie Smith does not have absolute immunity. See Beltran v. Santa Clara County, 514 F. 3d 906, (9th Cir. 2008).

IV.

Because the proceedings pertaining to Plaintiff are still pending and would be with the exclusive jurisdiction of the Superior Court these proceedings should be dismissed. Which would be true, however this Plaintiff is not asking this court to review, set aside or to evaluate the 342 Petition before the state court, the Plaintiff's claims are a separate issue and was barred from addressing in state court, Plaintiff is not asking this court to return her children, nor can this court.

Carmen Powell, In Pro Se

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Date: Aug. 4, 2008

Civil Case No. 07 CV 1836

Declaration of Service, I Carmen Powell placed a copy in a separate envelope addressed to the following individuals, with postage full prepaid, for each addressee named below and depositing each in the U.S. Mail at San Diego, Calif.

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Carmen Powell Aug 4, 2008 independently of [illegible]